No. 14,574

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN F. HERINGER, MABEL H. HERINGER, JOHN F. HERINGER, and ALTA G. HERINGER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the Tax Court of the United States.

BRIEF FOR THE PETITIONERS.

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OPINION BELOW.

The findings of fact and opinion of the Tax Court (R. 84-89) are officially reported in 21 T.C. 607.

JURISDICTION.

These cases involve gift taxes. The Commissioner's notices of deficiencies, one of which (R. 1, 11-15) is printed pursuant to stipulation and order filed June 22, 1955 (R. 1, 122), were mailed to taxpayers on Jan-

uary 17, 1952. (R. 5, 11.) Within ninety days thereafter, and on April 11, 1952, the taxpayers filed their petitions, one of which is printed pursuant to stipulation and order filed June 22, 1955 (R. 1, 122), with the Tax Court for redetermination under Section 1012 of the 1939 Internal Revenue Code. (R. 1, 5-15.) The decisions of the Tax Court that there were deficiencies in gift taxes were entered June 11, 1954. (R. 1, 90-93.) These cases are brought to this Court by petition for review, filed August 9, 1954 (R. 1, 96-113), pursuant to the provisions of Sections 1141 and 1142 of the 1939 Internal Revenue Code, as amended.

QUESTIONS PRESENTED.

Were the transfers of the real property here involved intended as, or in fact, gifts to any person under subsections (a) and (b) of Section 1000 of the Internal Revenue Code of 1939?

Assuming these transfers of real property were subject to gift taxes, under Sections 1000 and 1002 of the Internal Revenue Code of 1939, what percentage of their value, having fair regard for the actual executed intention and on the specific facts of these cases, were taxable—60% or 100%?

Assuming also that these transfers were subject to gift taxes, to what person or persons, were such gifts made for purposes of allowing the $3,000 annual exclusions under subsections (a) and (b)(3) of Section 1003 of the Internal Revenue Code of 1939? Was the

person or donee the corporation which held virtually naked legal title for the convenience of the shareholders? Or, were the persons or donees the eleven individual shareholders who, in fact, economically benefited from such transfers?

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set out in the Appendix, infra, pp. i-iii.

STATEMENT OF THE CASE.

The Tax Court explicitly found some of the facts in its Findings of Fact and Opinion. (R. 84-89.) Other facts, the Tax Court implicitly found through incorporation of the record by reference. Said Judge Opper: "Part of the facts were stipulated (R. 17-22, including Exhibits not printed) and are found accordingly. Other facts were established by oral testimony." (R. 85, 23-84.)

Petitioners shall hereinafter urge that there is no substantial evidence to support the findings upon which the Tax Court apparently predicates its opinion and decisions in these cases. This Court of Appeals will, of course, draw its own inferences from the undisputed facts and give consideration to the entire evidence to decide whether a mistake has been made in these cases. *Lucille McGah, et al., v. Commissioner*

of Internal Revenue, 9 Cir. 1954, 210 Fed. (2d) 769; *Gillette Estate et al. v. Commissioner,* 9 Cir. 1950, 182 Fed. (2d) 1010. Accordingly, we shall endeavor to excisively glean from this record the "entire evidence" upon which these cases are believed to turn.

Stephen and John Heringer are brothers. They have lived near Clarksburg, California since 1901. (R. 24, 36.) They have been in the farming business all of their lives. (R. 24, 36.) Stephen and John have farmed as partners in the Clarksburg area since their father died in 1912 or when Stephen was 23 years old. (R. 26, 27, 36.) Stephen and his wife, Mabel, were married October 2, 1912, and they had eight boys, six of whom are living. At the time of the trial in March of 1953, the youngest son was 20 and the remaining five ranged in age from 32 to 40 years. (R. 24-25.) John and his wife, Alta, have five children—four boys and a girl; and, at the time of the trial in March 1953, they ranged in age from 25 to 35 years. (R. 36.) All of the eleven children of Stephen and John Heringer were raised to, did, and do work on the families' farms in varying degrees—depending on age and whether away at school or in military service. (R. 24-84.) In this matter of work, particular note may be made of the testimony of Stephen's oldest son, Frederick:

> "Q. And when did you start farming?
>
> A. The day I was able to lift a shovel, you might say.
>
> Q. During the time you were in school, were you—during your vacations, did you work on the farm?
>
> A. Very definitely.

Q. Did you work hard, or did you have an easy time of it?

A. In my opinion, I slaved at it." (R. 54.)

The uncontradicted testimony at the trial before Judge Van Fossan of Frederick J. Heringer (R. 55) and the other children, amply supports the fact that, without the younger generation's working efforts, these large farming operations would not have prospered so well as they have. (Genette Heringer Whisenhunt, R. 41 et seq.; Donald S. Heringer, R. 67; Lester Heringer, R. 73; Wilfred Heringer, R. 75; John F. Heringer, Jr., R. 77; and George Heringer, R. 79.)

It would appear obvious that the Senior Heringers had definite business reasons for keeping their children working on the farm, in the family business, and not looking elsewhere for opportunities which might offer them a seemingly better future. See testimony of Frederick Heringer. (R. 52-56.)

Until 1942 all of the children of Stephen and John Heringer, old enough to work and at home, were paid "wages" by the parents' partnership. (R. 59, 60, 68.)

In 1942 six of the eleven children, living and working on the farms, formed a partnership to rent from their parents the Pierson District Property, or property known as Vorden Farms. This property was farmed under lease from the four Senior Heringers by this six man Vorden Farms partnership from 1942 to 1949. It was also this same property which later became the subject of the transfers by the four Senior Heringers to Vorden Farms, Inc., a California cor-

poration, in 1948 and 1949. (R. 60-62; 23-84.) After 1942 Stephen and John Heringer continued, as they had done since about 1912, to farm the 1600 acre Holland property. (R. 26, 29, 57.) The Holland property is better land to farm and not as expensive to operate as the Pierson District property. (R. 58-59.)

The factual record seems abundantly clear that the children of the families of John Heringer and Stephen Heringer were raised in a rigorous and spartan manner. (R. 54.) Until late 1948 *only* six of the eleven children were allowed to farm for their own profit and then only a portion of the families' properties and business. Keeping their children on the farms was thus on a business-like and thrifty basis. Even in 1948 and 1949, the critical years here involved, the four Senior Heringers made transfers to a close corporation; it was family dominated (hereinafter see preemption rights and agreements not to sell stock to outsiders); and one in which they owned 40% of the stock. Similarly, that corporation was used as a vehicle to hold bare legal title for benefit of all of the fifteen shareholders. That property was also but one segment of the land capital of the Senior Heringers. It was also the hardest and most expensive land to farm. (Stephen, R. 29-32; John, R. 38-40; Frederick, R. 55-60.) The best farm land the Senior Heringers retained unfettered for themselves.

On the question of *why* these transfers in 1948 and 1949, we believe the complete record shows the following testimony to be quite likely of understatement:

Stephen F. Heringer,

"Q. Now, Mr. Heringer, what if any intention went on in your mind, or the purposes for which you made this transfer of the Pearson District property to this corporation in 1948 and '49? Why did you do it?

A. We wanted to keep it in one piece, and we thought probably the boys would farm it more successfully if they had an interest in it." (R. 31.)

John F. Heringer:

"Q. Now, did you have any intention or purpose at the time you transferred for—what was your reason for transferring the Pearson District property, the 2,074 acres, in 1948 and '49 to the corporation as a——

A. Well, I thought we needed the boys' help and was trying to retain it." (R. 38.)

Petitioners made requests for findings of the Tax Court (Op. Br., p. 5):

"That each petitioner, in each year 1948 and 1949, transferred the real property here involved to the Vorden Farms, Inc., as a contribution to its capital which was not subject to gift tax." (Stip. of Facts, para. VII, R. 19-20; Exhs. 7-G, 8-H—not printed but permissible here per Stip., R. 121.)

"That each petitioner, in each year 1948 and 1949, intended to grant an economic interest to each of the eleven non-contributing shareholders in proportion to their shareholdings, not as a gift, but to strengthen the financial structure of their whole farming business, to create and stimulate the incentive of and induce their managerial and skilled

personnel to remain on the farms and in their business. (R. 31, 32, 38, 54-56, et al.) And, that the Petitioners were motivated by the primary desire, in making these transfers, not to make a gift but to try to insure a more efficient and profitable farming operation." (R. 31, 38.)

The foregoing requests for such findings as to intention, purpose, and effect of who was to, and did benefit—the title holding corporation or shareholders, was largely ignored by the Tax Court. Apparently, the Tax Court thought these requests for findings related to what it thought was the irrelevance of the question of whether there was "donative intent" or not. This because Statute Section 1002, I.R.C. of 1939, deems as a gift transfers for less than adequate and full consideration in money or money's worth. Application of Section 1002, in our view, was not in primary context in the foregoing requests for findings. The points were: (a) Can there be a "transfer . . . by any individual . . . of property by gift," under Section 1000 (a), 1939 I.R.C., to a corporation of which he or she is a substantial shareholder; and, (b) the non-contributing shareholders were not the objects of gifts as such, but necessary (tantamount to a consideration by way of inducement) to the overall success of the transferors' entire business interests; and, (c) who in fact were the intended objects or donees of the gifts if there were such under the tax statute,—individual people or their corporate pawn? (Cf., Pet. for Rev., R. 103-110.) Thus on the specific or unique facts of these Heringer cases, the explicit findings and

opinion of the Tax Court on the issues of "donative intent", and who were intended to, and did in reality benefit, are unclear and inadequate. It seems, therefore, that the implicit findings of the Tax Court, taken from the record, are at variance with its opinion.

Moreover, the quiet burial of certain facts in the record, that is, not expressed in the Tax Court findings and opinion, has worked a distortion of what should be the proper predicates for the applicable legal principles involved in these cases. The Stipulation of Facts is printed in the record, which is here in this Court. (R. 17-23.) But the *Exhibits* which illumine and implement the generality of phrasing in the stipulation of facts are not printed. However, these may be referred to here. (Per Stip., R. 121.) In considering the "entire evidence" this Court may wish to know in historical continuity that the Articles of Incorporation filed January 5, 1948 (Stip., Exh. 1-A), provided on page 2, par. Sixth: "That the shareholders shall have preemptive rights to subscribe to any and all issues of shares or securities of said corporation."

In this connection too, at the first meeting of all of the shareholders of Vorden Farms, Inc., the minutes reflect the following (Stip., Exh. 4-D):

> "Agreement was also reached that without amendment of the Articles or By-Laws no shareholder would sell or assign to other than an original shareholder or shareholders any of his or her shares in Vorden Farms, Inc., without first notifying and allowing the corporation thirty days'

> time in which to purchase the said shares offered for sale or to be assigned at their fair and reasonable book value at the beginning of the calendar year in which the said written proposal to sell or assign occurs."

In the Application to Issue Stock before the Corporation Department of the State of California (Stip. Exh. 2-B) it was represented (p. 1):

> "Said Frederick J. Heringer and Donald S. Heringer are incorporating this business for themselves and their relatives and do not intend to sell stock on the open Market."

Before any of the transfers here involved were made, we find a clearly expressed understanding of all concerned on this question of *intention* and *purpose;* not "explanation" after action or transfer as may be inferred in the findings and opinion of the Tax Court. (R. 87.) This expressed understanding occurred at the special meeting of the Board on December 24, 1948 (Stip. Exh. 7-G):

> "* * *. The effect of such contribution to the capital of this corporation *will be* to benefit the other eleven shareholders to the extent of their aggregate three-fifths (3/5) of the value of said one-half (½) interest in the land so conveyed, in proportion to their respective shareholdings in Vorden Farms, Inc. As an example, the owner of 2500 shares benefits to the extent of one-twentieth 1/20) of the value of the three-fifths (3/5) conveyed. * * *." (Emphasis supplied.)

Acceptance on the foregoing basis was also made of record in those minutes.

Again at the Special Meeting of the Board on January 5, 1949 it was stated as manifestation of purpose, contemporaneous with action and not "explanation" afterwards (Stip. Exh. 8-H):

> "The Senior Heringers thought, among other things, that the whole of the farm lands in question could better and more economically be operated as a complete and integrated unit."

And, on the nature of this particular corporate fiction, as expressed in the minutes of the Special Meeting of the Board on January 15, 1949 (Stip. Exh. 9-I) we find:

> "The corporation was presently *organized and operating primarily* to hold the title to the lands in question." (Emphasis supplied.)

It is true that when the Articles of Incorporation were originally prepared and as filed early in the year 1948, namely, on January 5, 1948, they recited the general purposes for which the corporation was formed, to wit: "Generally, to carry on and do all things pertaining to the conduct of a farming, ranching, and agricultural business; * * *" (R. 18, Exh. 1-A, R. 86.) But it is equally true that, like all customarily drawn articles, this corporation *could have run a railroad.* (Exh. 1-A, p. 2.) However, we believe the accepted test is *not what the corporation could do but what it did do,* under its charter. It is similarly a fact that the purposes or prospective functions of the corporation changed between January 5, 1948, when the two oldest boys of John and Stephen and their attorney, organized the corporation, and

in December 1948 when the rest of the families, particularly the four Senior Heringers, were agreeable to going along. So it would seem the generality of purposes and objects of the Articles of Incorporation in January 1948 should give way to the realities of function, conduct, and operation under the conditions as they existed and were acted upon in December 1948 and the following years.

The preceding distilled version of the facts, history and actions of the personalities involved patently shows that the Senior Heringers were not uncertain about the direction they wanted to go, and who, in fact, was to benefit. Certainly Vorden Farms, Inc., was not the intended nor real donee.

The Commissioner and Tax Court have determined that on this record:

1. A gift was made under the tax laws, even though none was intended in point of fact.

2. The corporation was the sole donee, not the eleven children, whether the facts compelled a contrary executed intention or not.

3. The donors were their own donees to the extent of 40% of the value of property transferred even though the realities of ownership are squarely contrary to the mechanical means employed to transfer the nominal legal title to the corporation merely for the convenience of the shareholders. (See examples (a) and (b), Pet. for Review, R. 108-110.)

The "seamless web" of the facts in these cases cannot wind up in any one place in this brief and

there is need for some repetition, with the hope of not unduly belaboring this Court. The pertinent facts—all of those facts—should govern the result in these cases. Only Judge Van Fossan, who tried these cases, was fully aware of the vitality of the facts and of the people involved. His trenchantly terse dissenting opinion, on principle, is in eloquent contrast to the unrelated to the facts legalism of the majority opinion. (R. 89, 88.)

Arguments which may be construed as *ad hominem* are not regarded with favor. However, we should be less than honest if we were not to call to the attention of this Court what seems to us an inherent error in this type of fact case, in the reassignment by the Tax Court, for opinion writing, to a judge who did not try the cases, see the witnesses nor hear the live evidence. Moreover, the statement at the end of the Tax Court opinion "Reviewed by the Court" has little meaning to either the Court of Appeals or the parties on appeal where the Tax Court record does not show who and what number of the sixteen Tax Court Judges participated in the decision of the majority. In *Julius L. Stern, et al. v. Commissioner* (3 Cir. 1954), 215 Fed. (2d) 701, *Judge Maris,* for a unanimous Court of Appeals reversal of a decision of the Tax Court, makes abundantly clear what we are trying to indicate here.

In the *Stern* case, Tax Court Judge Hill, who tried the case, dissented, as did Judge Van Fossan, in the case at bar, after a reassignment to Judge Opper, who spoke for the stated majority, there as here. We

believe the *Stern* case has a similar parallel in these *Heringer* cases in that the Court of Appeals in the *Stern* case reversed a Tax Court decision which exaggerated a fiction contrary to the clear import of the facts in the record.

STATEMENT OF POINTS TO BE URGED.

The essential errors to be urged for reversal of the decisions of the Tax Court are:

1. The Tax Court erred in determining that there was a taxable gift to this particular corporation or any taxable transfers for gift tax purposes, on the specific facts of these cases, under an appropriate interpretation of the applicable Internal Revenue Laws.

2. If there were transfers taxable as gifts, only 60% of the value of the properties transferred were subject to the tax. This is particularly so, among other reasons, because the donors, owning 40% of the stock in the corporation, increased the value of their stock in the corporation to the extent of that 40%, and in lieu of the value in the real property transferred to the corporation. Any other construction of the factual situation here would be neither sensible nor right.

3. If there were taxable gifts involved, the real donees were the eleven individual children and not the corporation. This is so because the gift tax statute, as indicated by the Congressional intent and as interpreted by the Courts, taxes the actual shifts of economic and beneficial ownership, which ownership, after the transfers, was

in the individual children and not the corporation interposed for the convenience and under the dominance of the shareholders. Accordingly, eleven $3,000 exclusions were properly allowable to each transferor for each year rather than a single exclusion as determined by the majority of the Tax Court.

We have delineated above the "essential errors" to be argued in this brief. We understand such recital does not preclude this Court and counsel from considering or urging any of the 27 particular specifications of error set forth in the Statement of Points accompanying the Petition for Review in this Court. (R. 116-121, 96-113.)

SUMMARY OF ARGUMENT.

The Tax Court was wrong in finding and holding that these transfers were taxable gifts. Grossly wrong in finding and holding these transfers as taxable gifts to their "full extent." Plainly wrong in failing to disregard the corporate entity, on the specific facts of these cases, and to find and hold the individuals and not the corporation were the donees. Obviously wrong in finding and holding that the corporation was the "person" or donee for purposes of the $3,000 annual exclusion rather than each of the eleven children—being the "persons" or individuals to whom the transfers were, in point of fact and under the gift tax law, made.

ARGUMENT.

The dominant facts are the most convincing argument to support the contentions urged in behalf of these petitioners. Those facts are in the record.

Agreeable, we trust, to the soundness of the foregoing point of view, we hereinafter list by appropriate and abbreviated references, the citations which we believe this Court, in relating the applicable rules of law to the particular facts of these cases, may wish to consider in the appeal at this juncture.

1. On the question of these transfers taxable as gifts, and the extent thereof:

1939 Internal Revenue Code, as amended.

Sec. 1000—IMPOSITION OF TAX

(a) For the calendar year 1940 and each calendar thereafter, a tax, computed as provided in Section 1001, shall be imposed upon the transfer during such calendar year *by any individual,* resident or non-resident, *of property by gift* * * * (Emphasis supplied.)

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the *gift* is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *. (Emphasis ours.)

Treas. Reg. 108, Sec. 86.2 Transfers reached

(a) In general—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or in-

tangible. * * * In the following examples of transactions resulting in taxable gifts, it will be understood that the transfers were not made for an adequate and full consideration in money or money's worth.

(1) *Transfer of property by a corporation to B is a gift to the latter from the stockholders of the corporation. If B himself is a stockholder, the transfer,* not being a distribution from earnings or in liquidation to which B is entitled as a stockholder, *is a gift to him from the other stockholders* * * *. (Emphasis ours.)

Comment: The converse situation and argument is made in R. 103-107.

Ways and Means Committee House Report, Revenue Act 1932 H.R. No. 708, 72 Cong., 1st Sess., p. 28; 26 U.S.C.A. Int. Rev. Acts, p. 580.

"The words 'transfer * * * by gift and whether * * * direct or indirect' are designed to cover and comprehend all transactions—whereby and to the extent (Sec. 503) that property or a property right is donatively passed to or conferred upon another, *regardless of the means or the device employed in its accomplishment.* For example, (1) *a transfer of property by a corporation without a consideration,* or one less than adequate and full in money or money's worth *to B would constitute a gift from the stockholders of the corporation to B.* (Compare, example (1), of Reg. 108, Sec. 86.2 (a), supra); (2) *a transfer by A to a corporation owned by his children would constitute a gift to the children* * * *." (Emphasis and indicated comparison supplied.)

Comment: Example (2), supra, was not recognized in later regulations. But why is it not reasonably to be implied?

Cases:

Burnet v. Guggenheim (1933), 288 U.S. 280, 286. See Petition for Review (R. 104);

Helvering v. Hutchings (1941), 312 U.S. 393, 395, 397. See Petition for Review (R. 104-107);

A. Gregory v. The State of California, 77 Cal. App. (2d) 26, 174 Pac. (2d) 863 (R. 107);

Robert H. Scanlon (October, 1940), 42 BTA 997.

Frank B. Thompson (June 1940), 42 BTA 121 (In 1942, CA-6 remanded this case on stipulation and granted substantial refunds and purportedly recognized the theories advanced by petitioners and in Judge Van Fossan's dissent here. 42-1 U.S.T.C. par. 10165-6; also see CCH—Fed. Estate and Gift Tax Reporter, par. 3200.27 et seq.)

Emily C. Collins (1943), 1 T.C. 605, at 608, 610. (Judge Opper agreed with the rationale of Judge Mellott's dissent, which agreement seems patently inconsistent with his present opinion here on review. Also see, CCH—Fed. Estate and Gift Tax Reporter, par. 3130.20.)

2. On the question of the number of exclusions and disregard of the corporate entity, on the specific facts of these cases, together with the added fact that the Congress and the Courts seem clear in subjecting to

the gift tax statute only individuals as persons and not corporations.

1939 Internal Revenue Code, as amended

"Sec. 1003—*NET GIFTS*

(a) *General Definition*—The term 'net gifts' means the total amount of net gifts made during the calendar year, less the deductions provided in Section 1004.

(b) *Exclusion from gifts*

(1) * * *.

(2) * * *.

(3) *Gifts after 1942*—In the case of gifts (other than future interests in property) made *to any person by the donor* during the calendar year 1943 and subsequent calendar years, the first $3,000 of *such gifts to such person shall not,* for purposes of subsection (a) be included in the total amount of gifts made during the year." (Emphasis supplied.)

"Sec. 3797—DEFINITIONS

(a) When used in title, where not otherwise distinctly expressed or *manifestly incompatible with the intent thereof—*

(1) *Person.*—The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, company or corporation."

Comment: The irrelevance of this general definitions section to an interpretation of the gift tax statute, as "manifestly incompatible with the intent thereof," is clearly disposed of in the opinion of Mr. Justice Stone in the *Hutchings* case, supra, perti-

nent allusion to which is made in the Petition for Review. (R 103-107.)

Treas., Reg. 108, Sec. 86.10 Total amount of gifts (See Appendix.)

Comment: While this Regulation recognizes the definition of "any person" to be the *individual* beneficiaries of a trust entity under the rationale of the *Hutchings* decision, it is silent on the application of Mr. Justice Stone's definition in the context of the statute as applying to *only* "individuals" as real or beneficial owners where a family corporation is concerned. See, Petition for Review. (R. 104-107.)

Ways and Means Committee House Report, Revenue Act of 1932, H.R. No. 708, Supra, p. 17.

Comment: This Report, example (2), supra (pp. 18-19), is definitely in context on this second question on the number of $3,000 annual exclusions allowed to each donor.

Cases:

Helvering v. Hutchings, supra;
A. Gregory v. The State of California, supra;
Emily C. Collins, supra, dissent, at p. 610;
Stephen F. Heringer, et al., dissent (R. 89);
U.S. v. Brager Building & Land Co., 124 F. (2d) 349;
Heringer Bros. & Sons, 53 F. Supp. 716 (Government Appeal to CA9 dismissed April 3, 1944).

It is our belief that the Heringers' gift tax cases sum up as follows:

1. There was no taxable gift to anyone as to the 40% of the value of the property here transferred.

The statute, Section 1000, certainly does not impose a gift tax upon the transfer "of property *by gift*", where, on the facts of these specific cases, no gift was intended by the transferors to themselves, and no such 40% of the property in point of ultimate fact, was effectively relinquished by them. In the first place, there were not present the elements of a common law gift. Secondly, there was no intended gift of the 40% to the corporation or to the individual shareholders. Third, the corporation on these facts was clearly a mechanical vehicle to effect the transfer of only 60% of the value of the land to the eleven individual shareholders. Further, see two examples and statement in R. pp. 108-110.

To arrive at the foregoing determination, certainly *there are here present facts* which are convincing to such a result, whether one relies on a sensible interpretation of the taxing statute; the regulations of the Commissioner; or the reasoning from the *Guggenheime* case, supra; the *Scanlon* case, supra; the *Hutchings* case, supra; the *Collins* case, supra, or even the *Thompson* case upon which the majority opinion of the Tax Court wholly relies. The *Thompson* case will hardly stand up as authority on the facts and on the reasoning of the majority opinion to the cases at bar. The facts here are distinguishable from the *Thompson* case. Nor can the *Thompson* case be correctly said to have "stood undisturbed by legislative, judicial or administrative action for upward of 13 years." (R. 88.)

Nor is the *Thompson* case distinguishable on its facts, or *in principle,* from the later *Scanlon* case. It is also at variance with the reasoning and legal principles which flow from the *Hutchings'* opinion and other analogous decisions. The fact that the *Thompson* case was settled, agreeable to this Point 1, is in itself of further considerable practical recognition of the controlling rule of law which should be applied in these *Heringer* cases.

2. On the question of the transfers of the 60% interest in the property, the eleven individual children were the donees for whom each donor was entitled to one annual $3,000 exclusion.

If we look to the facts and clearly expressed intentions of the transferors, no gifts were intended to be made to anyone, neither at common law nor under Section 1000; *a fortiori,* this corporation was not intended as the donee of a gift under the statute. As Mr. Justice Stone aptly stated at page 396 in the *Hutchings* decision, supra: "One does not speak of making a gift to a trust rather than to his children who are its beneficiaries." Nor, we submit, to the corporation here.

However, it may be that the eleven individual shareholders who were actually intended to be benefitted for a consideration are faced with overcoming the application of Section 1002 of the taxing statute. This would be so because a Court could find that there was no "adequate and full consideration in money or money's worth" even though the parents had their practical business reasons for recognizing the past

services of their children and were looking to the future monetary success of their overall farming business. But see, *Estate of Monroe D. Anderson,* 8 T.C. 706. Also to be noted are the numerous cases where Courts have found "adequate" consideration under Section 1002 in husbands and wives settlements when incident to a divorce. It does not seem too much of an extension of the principle in these divorce cases to the specific facts in the *Heringer* cases by finding adequate consideration sufficient to overcome the application of Section 1002.

But assuming that there was a taxable gift under Section 1000 with respect to this 60% of the value of the property; and further assuming that there was not an adequate consideration under Section 1002, certainly the donee (or donees) was not the "person" of the corporation but the eleven individual "persons" or shareholders. This result should be true and right whether premised upon the manifested and uncontradicted intentions of the transferors; or a reasonable interpretation of subsections (a) and (b)(3) of Section 1003; or based on the analogous reasoning in the *Hutchings* case, supra; or, a fair interpretation of the Commissioner's regulations when placed alongside of the expressed Congressional intention, wherein it was stated that "the transfer by A to a corporation owned by his children would constitute a gift to his children".

In the light of the foregoing considerations, we submit that the decision of the majority of the Tax Court is unsound and at variance with the principles

stated by the Congress and enunciated in the governing U.S. Supreme Court and other apposite Courts' decisions.

CONCLUSION.

The decision of the Tax Court should be reversed.

Dated, San Francisco, California,
November 21, 1955.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

Internal Revenue Code of 1939:

"Sec. 1000. IMPOSITION OF TAX

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in Section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. * * *

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *

* * * (26 U.S.C. 1940 ed., Sec. 1000)

"Sec. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year. (26 U.S.C. 1940 ed., Sec. 1002)

"Sec. 1003. NET GIFTS

(a) GENERAL DEFINITION—The term "net gifts" means the total amount of gifts made during

the calendar year, less the deductions provided in Sec. 1004.

(b) EXCLUSIONS FROM GIFTS—

(1) * * *

(2) * * *

(3) GIFTS AFTER 1942—In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1943 and subsequent calendar years, the first $3000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during the year." (26 U.S.C. 1940 ed. as amended 1942, Sec. 1003)

"Sec. 3797. DEFINITIONS

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(1) *Person.*—The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, company or corporation." (26 U.S.C. 1940 ed. Sec. 3797)

Treasury Regulations 108, promulgated under the Internal Revenue Code of 1939, as amended:

"Sec. 86.2. TRANSFERS REACHED

(a) *In General.*—the statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. * * *

In the following examples of transactions resulting in taxable gifts, it will be understood that the transfers were not for an adequate and full consideration in money or money's worth:

(1) Transfer of property by a corporation to B is a gift to the latter from the stockholders of the corporation. If B himself is a stockholder, the transfer, not being a distribution from earnings or in liquidation to which B is entitled as a stockholder, is a gift to him from the other stockholders. * * *"

* * * * * *

"Sec. 86.10. Total amount of gifts.—Except with respect to any gift of a future interest in property, the first $3,000 of gifts made to any one donee during the calendar year 1943 or during any calendar year thereafter shall be excluded in determining the total amount of gifts for such calendar year. In the case of a gift in trust, the beneficiary of the trust is the donee of the gift. * * *"